No. 2683

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. HOMER FRITCH INCORPORATED (a corporation), E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR A REHEARING IN BEHALF OF PLAINTIFFS IN ERROR.

IRA A. CAMPBELL,
Merchants Exchange Building, San Francisco,
Attorney for Plaintiffs in Error and Petitioners.

Filed this.....day of July, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2683

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. HOMER FRITCH INCORPORATED (a corporation), E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR A REHEARING IN BEHALF OF PLAINTIFFS IN ERROR.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiffs in error respectfully ask a rehearing upon the following grounds:

(1) The opinion misstates a rule of law;

(2) The opinion contains a misstatement of the record;

(3) The opinion overlooks several points on which plaintiffs in error placed great reliance in bringing the writ.

I.

THE OPINION MISSTATES A RULE OF LAW.

The telegram of September 12, 1911, read as follows:

> "Washington, D. C., Sept. 12, 1911. 10:07 A. M.
> J. Homer Fritch, Inc.
> San Francisco, Cal.
> Would like to have option for purchase of Homer extended thirty days on terms mentioned in paragraph twenty-one of charter otherwise charter to terminate as provided therein answer.
> Charles Earl,
> Acting Secretary."

(Tr. p. 26.)

The court holds—as urged by plaintiffs in error—that this telegram was ambiguous.

The telegram of September 14, 1911, read:

> "San Francisco, Sept. 14, 1911.
> Acting Secretary,
> Dept. of Commerce & Labor,
> Washington, D. C.
> As requested in your telegram of twelfth instant charter steamer 'Homer' hereby extended for further period of thirty days from September thirteenth nineteen eleven with option of purchase.
> J. Homer Fritch, Inc."

(Tr. pp. 27, 84, 86.)

Plaintiffs in error claimed that, having received this telegram on September 14, 1911, and not having replied to it until October 25, more than two weeks after the

termination of the extension period, the Department was bound by the construction of the telegram of the 12th which it contained. They invoked a rule supported by abundant and unquestioned authority, and stated by Judge Farrington in

Scully v. United States, 197 Fed. 327, at p. 343, as follows:

> "It is a well established principle, that when there is a doubt as to the meaning of a contract, a party will be held to that meaning which he knew the other party supposed the words to bear."

The court holds that plaintiffs in error are not entitled to invoke this rule because (so it is said) they failed to show "that they were induced to change their position for the worse",—in other words because their case lacked one element of estoppel.

But the rule invoked *does not depend upon estoppel at all. It is purely a rule of construction.*

This was held expressly in a case cited at page 21 of plaintiffs in error's brief, of which the court makes no mention.

Central Trust Co. v. Wabash At. L. & P. Ry. Co., 34 Fed. 254-258,

in which Judge Thayer said:

> "We do not hold that the conduct of the St. Louis, Kansas City & Northern Railroad and its successors in paying mileage creates an estoppel against it and its successors, but we do hold that the interpretation so put upon the agreement should determine its true construction, unless it is at variance with the express provisions of the instrument, which in this instance does not appear to us to be the case." (p. 258)

We cited numerous cases by the federal courts, including the United States Supreme Court, in which this rule was invoked against the United States. *It cannot, therefore, be a rule of estoppel.* Estoppel can never be invoked against the sovereign. The court's opinion is, therefore, in direct conflict with the following cases cited in plaintiffs in error's brief.

Garrison v. U. S., 7 Wall. 688; 19 L. Ed. 277;
Scully v. U. S., 197 Fed. 327;
U. S. v. Newport News Shipbuilding & Dry Dock Co., 178 Fed. 194;
Simpson v. U. S., 31 Ct. Cl. 217, 243;
Otis v. U. S., 20 Ct. Cl. 315;
Gantz v Dist. of Columbia, 18 Ct. Cl. 569.

The case cited by the court as holding that the rule was dependent upon estoppel *(The Alberto*, 24 Fed. 379), would be entitled to no weight against the foregoing direct authorities. But moreover it does not support the proposition. In that case the libelant's conduct clearly estopped him. For that reason the occasion did not arise to invoke the rule as to the construction of the contract.

II.

THE OPINION MISSTATES THE RECORD.

The court says:

> "In the present case there is a total absence of showing that the plaintiffs did anything in reliance upon the silence of the Secretary or upon their understanding of the contract. On September 12,

1911, the steamer was in Oakland Creek, and there it remained during the period of the extension of the option. There is no evidence that the plaintiffs would have chartered it or used it or would have done otherwise with it than they did but for the option."

Plaintiffs in error complain bitterly of this statement. In the trial court they offered the most convincing evidence of this character, and the trial judge ruled it out as immaterial. They assigned the rulings as error, and now they are told that the judgment is affirmed because the record is without such evidence. We can do no more than to lay this evidence before the court in this petition:

"Mr. CASSELL. Q. Will you state what was the nature of the negotiations you then had pending for the sale of the 'Homer' to other parties in the event that the sale to the Government did not go through in accordance with the terms of the provisions of clause 21 of the charter-party.

Mr. THOMAS. We object to the question, if your Honor please, upon the ground that the answer would be immaterial, irrelevant and incompetent and it would have no bearing at all on this case.

The COURT. He has stated that there were negotiations and that is all that is material; the specific nature of them is not material. The objection is sustained. The fact is Mr. Cassell I do not think it is material whether he had other negotiations. He had a right to want to sell the vessel to the Government, whether he had other people seeking it, or not.

Mr. CASSELL. I do not desire to offer anything further in face of your Honor's ruling, but I want to show that the parties were acting in absolutely good faith, and that they actually did have prospects of selling the vessel.

The COURT. You don't have to show good faith in that regard.

The court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 3.

Mr. CASSELL. Q. Mr. McKee, I will show you a contract dated September 15, 1911, signed by yourself and Mr. W. S. Scammell, and I will ask you if that contract was made by yourself and Mr. Scammell on that date.

Mr. THOMAS. If the court please, I desire to object to any testimony concerning this contract as it does not appear to be within the issues—it does not purport to be a contract between the United States and the plaintiff here, and that it is immaterial, irrelevant and incompetent.

Mr. CASSELL. This purports to be a contract between Mr. McKee and Mr. Scammell whereby Mr. Scammell was to purchase the 'Homer' at a stated price. The contract contains this provision: 'If and when the charter on the steamer "Homer" in favor of the United States Government, shall terminate, which is expected to be about 30 days from this date, and if the United States Government does not exercise its option to purchase said steamship "Homer", then the interest of the undersigned in the steamship "Homer" is sold and assigned to said Scammell at the rate of $35,000 for the entire interest in the vessel.' The court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 4.

Mr. CASSELL. I will offer this as 'Plaintiffs' Exhibit No. 1 for Identification.' The said contract was thereupon marked Plaintiffs' Exhibit No. 1 for Identification and was in the words and figures following:

(Plaintiffs' Exhibit No. 1 for Identification—Memorandum, Dated September 15, 1911.)

San Francisco, California, September 15, 1911.

Receipt is acknowledged by the undersigned from Mr. Walter S. Scammell of the sum of One Thousand ($1000) Dollars, being payment on account of the purchase of the SS. 'Homer' upon the following conditions:

If and when the charter now in force upon the SS. 'Homer' in favor of the U. S. Government which charter contains an option in favor of the U. S. Government to purchase the SS. 'Homer', shall terminate (which is expected to be about thirty days from this date), and if the U. S. Government does not exercise its option to purchase the said SS. 'Homer,' then the interest of the undersigned in the said SS. 'Homer' is to be sold, assigned and transferred to the said Walter S. Scammell upon payment therefor at the rate of thirty-five thousand ($35,000) dollars for the entire vessel, as follows:

Cash upon delivery of bill of sale, eight thousand ($8,000) dollars, (including the deposit of $1,000, herein acknowledged) the balance in five equal notes payable to the order of the undersigned, six, twelve, eighteen, twenty-four and thirty months from date of transfer, bearing interest at six per cent per annum, secured by first mortgage upon the said interest in the said SS. 'Homer'; the maker and form of the said mortgage to be mutually satisfactory to the said Scammell and the undersigned.

If the U. S. Government exercises its option to purchase the said SS. 'Homer', the above deposit of $1000 is to be returned upon the order of the said Scammell.

If the option to purchase the said SS. 'Homer' is not exercised by the U. S. Government, and the purchase of the said SS. 'Homer' is not completed by the said Scammell (upon the conditions above set forth) within fifteen days after notice to him by the undersigned that the option of the U. S. Govern-

ment has not been exercised, then and in that event the above-mentioned deposit of $1000 shall be forfeited to the undersigned.

The interest of the undersigned in the said SS. 'Homer' to be transferred free and clear of all liens or indebtedness.

Insurance premium to be prorated.

Time is of the essence of this memorandum.

(Signed) JOHN D. McKEE.

Approved by:

W. S. Scammell.

Witness:

W. J. Woodside.

Mr. CASSELL. Q. Will you state when you first heard that the Government had declined to recognize the extension of the charter, the alleged extension of the charter, contained in the telegrams we have referred to?

Mr. THOMAS. We object to this as immaterial.

The court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 5.

Mr. CASSELL. Q. Was it the belief of yourself, at that meeting and at all times thereafter during the months of September and October, 1911, that that charter had been extended by those telegrams?

Mr. THOMAS. I desire to object to that question, your Honor, upon the ground that the belief of Mr. McKee is in nowise binding upon the defendant.''

The court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 6.

(Tr. pp. 49-50.)

* * * * * * *

Q. Do you remember whether during the month of September, 1911, you received any offer from any one other than the Government to purchase the steamer 'Homer'?

Mr. THOMAS. We object to that question as incompetent, irrelevant and immaterial.

The court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 14.

Mr. CASSELL. Q. Were negotiations pending during the month of September with other parties than the Department of Commerce and Labor in which you were looking towards the sale of the Steamer 'Homer' to such parties in the event that the Government did not exercise its options?

Mr. THOMAS. Same objection.

The court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 15.

Mr. CASSELL. Q. Did those negotiations subsequently go through when the Government failed to exercise its option?

Mr. THOMAS. Same objection.

The court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 16."

(Tr. pp. 90-91.)

See

Assignments of Error, Nos. 17 and 18 (Tr. pp. 122-123.)

Plaintiffs in error were precluded from showing, first, that at all times from September 12 to October 13, 1911, their belief was that the charter was extended (Exceptions Nos. 5 and 6 supra); secondly that although given an opportunity to sell on September 15,

1911, for $35,000, they refused to sell except "*if and when the charter now in force upon the S. S. 'Homer' in favor of the U. S. Government * * * shall terminate*". (Exceptions Nos. 3, 4, 14, 15 and 16 supra).

The trial court refused to let them testify to their continued belief that the charter was extended.

The trial court refused to let them show that acting on this belief they lost interest at six per cent on $35,000 for thirty days.

They covered these matters in their assignments of error Nos. 17 and 18.

Without any mention whatever of these matters, and without passing upon these assignments, the court holds "that there is a total absence of showing that the plaintiffs did anything in reliance upon the silence of the Secretary or upon their understanding of the contract."

It is submitted that the rulings of the trial court preventing such a showing require a reversal of the judgment upon the very theory which this court has adopted.

III.

THE OPINION IGNORES POINTS UPON WHICH PLAINTIFFS IN ERROR RELIED IN BRINGING THE WRIT.

Plaintiffs in error invoked the rule that when a contract is ambiguous it is to be given that construction least favorable to the party drawing it. It is admitted

that the Department prepared the telegram of September 12, 1911, which contained the ambiguous language.

In

Garrison v. U. S., supra,

the Federal Supreme Court applied this very rule against the Government as the means of solving an ambiguous contract.

In

Scully v. U. S., supra,

Judge Farrington applied it in the same way.

We cannot believe that, with such authority supporting it and its applicability made clear by the holding of the court that the contract here involved was ambiguous, this rule deserved to be passed by without notice in this case.

Plaintiffs in error contended that, the contract being ambiguous, all of the prior, contemporaneous and subsequent transactions should be looked into by the court to determine its true meaning. They cited repeated and recent decisions of the Supreme Court of the United States to this effect.

Merriam v. U. S., 107 U. S. 437; 27 L. Ed. 531;
Reed v. Merchants Mutual Ins. Co., 95 U. S. 23; 24 L. Ed. 348;
U. S. v. R. P. Andrews & Co., 207 U. S. 229; 52 L. Ed. 185

Plaintiffs in error showed a case under this rule which we submit conclusively established the justness of their demand against the Government. That the court should have omitted the facts upon which plain-

tiffs in error relied in this regard from the statement of the case contained in the opinion, and have failed to discuss the point, we deeply regret. The Department by its letter of December 2, 1910, practically told plaintiffs in error that they might expect a thirty days' extension *of the charter* during September, 1911, and this fact, we submit, was in all fairness worthy of consideration when it came to determining the true meaning of the ambiguous clause in the telegram of September 12, 1911.

Dated, San Francisco,
July 26, 1916.

Respectfully submitted,

IRA A. CAMPBELL,
Attorney for Plaintiffs in Error and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for plaintiffs in error and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

IRA A. CAMPBELL,
Counsel for Plaintiffs in Error and Petitioners.